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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1151

UNITED STATES OF AMERICA,

Petitioner,

v.

RALPH CECCOLINI,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

Pursuant to an Order of this Court, the time for filing the within Brief has been extended to October 25, 1977.

Questions Presented

In the opinion of respondent, the following questions are presented:

(1) Does the double jeopardy issue clause, and the decision of this Court in *U.S.* v. *Martin Linen Supply Co.*, 97 S.Ct. 1349 (1977), bar the government's attempted appeal from the judgment of acquittal entered in the District Court pursuant to Rule 29?

(2) Whether the holding of the Courts beiow, that the government failed to meet its burden of establishing attenuation of the taint of a concededly illegal search was free from error and supported by substantial evidence?

(3) Whether the Government is estopped from maintaining an appeal by virtue of its unclean hands?

Constitutional Provisions Involved

The United States Constitution Amendment 5:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

The United States Constitution Amendment 4:

> "The right of the People to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statutory Provisions Involved

18 U.S.C. §3731:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing the indictment or information as to any one or more counts, except that no appeal shall lie where the

> double jeopardy clause of the United States Constitution prohibits further prosecution."

Federal Criminal Rule Involved

Federal Rule of Criminal Procedure 29:

> "Motion for Judgment of Acquittal (a) motion before submission to jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed. If the evidence is sufficient to sustain a conviction of such offense or offenses. If a defendant's motion for a judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right. (b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all evidence, the Court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. (c) Motion after Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within seven (7) days after the jury is discharged or within such further time as the court may fix during the seven (7) day period. If a verdict of guilty is returned the court may, on motion, set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal.

It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury."

Preliminary Statement

The government, pursuant to 18 U.S.C. §3731, appealed to the Second Circuit Court of Appeals from a judgment of acquittal entered in the Southern District of New York (A2) on February 10, 1976, by the Honorable Lee P. Gagliardi, United States District Judge for the Southern District of New York. On that date, Judge Gagliardi announced that he acquitted the defendant of Count 2 and found him guilty of Count 1 but immediately set aside his verdict on Count 1 and granted defendant's motion for judgment of acquittal on the grounds that the evidence relied on by the Government was the unattenuated fruits of an illegal search.

It is the position of the defendant that under the circumstances presented by this record, a Government appeal violates the double jeopardy clause. It is further contended that the courts below correctly held that the Government had failed to attenuate the taint of a concededly illegal search. Finally, it is submitted that the Government is estopped from maintaining this appeal because it does not come into court with clean hands.

Statement of Case

In 1973, the Federal Government conducted a gambling investigation in the North Tarrytown area (A59-63). The surveillance conducted by the FBI agents had included various businesses on Beekman Avenue which were frequently visited by one Joseph Millow, including defendant-respondent's flower shop. At no time during this period were any of the employees of any business enterprise located on Beekman Avenue questioned with regard to

gambling activities. The surveillance was ultimately discontinued, in December, 1973 (A63).

On December 18, 1974 North Tarrytown Patrolman Ronald Biro, entered defendant-respondent's flower shop in uniform and on duty. He was observed entering the shop by a young lady named Lois Hennessey. Ms. Hennessey was reading her newspaper when Patrolman Biro entered the flower shop. Biro proceeded through the area opened to the public into a portion of the flower shop customarily used only by the employees. He observed an envelope on the cash register from which allegedly protruded what appeared to be United States currency. Patrolman Biro proceeded, without further ado or probable cause, to seize and search the envelope. After he had removed and examined the contents of the envelope he then interrogated Ms. Hennessey concerning them (A34-37, 51-53, 54-57). In this way he then and there discovered the existence of Ms. Hennessey as a person having knowledge that could be utilized by the Government (A58-59). He thereafter replaced the envelope and its contents on the cash register, and left[1]. The defendant, was not present at any time during this occurrence and was in no way aware that there had been a search (A46).

Patrolman Biro notified the North Tarrytown Detective Division without twenty-four hours of the previously mentioned occurrence (A56-57). The Detective Division thereafter notified FBI Agent Emory with whom they were then working jointly on a gambling investigation. Emory then proceeded to notify prosecutor Abzug (A73) and then interviewed Ms. Hennessey specifically about the incident

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[1] It subsequently disappeared and there was thus no physical evidence in the possession of the Government to be suppressed. Only the testimony of Patrolman Biro (upon which Judge Gagliardi never ruled explicitly) and that of Ms. Hennessey remained as the fruits of the illegal search.

of December, 1974 (A67-68, 42-43; cf. 68-69). The Emory-Hennessey interview occurred in or about April of 1975 (A73). The defendant was subsequently subpoenaed before the Grand Jury in May of 1975. At the time of defendant's appearance before the Grand Jury he appeared without counsel and was somewhat disingenuously advised that he was not the target of investigation (A73). It is interesting to note from a point of comparison that the other witnesses in the same investigation were specifically advised of their right to counsel, of the privilege against self-incrimination, and were not given any disarming advice that they were not targets of the investigation, even when in fact they were not such targets. The 3500 material turned over by the Government showed, for example, that Ms. Albanese, who appeared with counsel, was specifically warned of her privilege against self-incrimination and her right to counsel but received no statement that she was not a target of the investigation. Compare this with *U.S.* v. *Jacobs*, 547 F. 2d 772 (2d Cir., 1976). The defendant was, however, indicted immediately thereafter when his answers were at variance with those of Ms. Hennessey.

In the over six months between the illegal search and defendant's Grand Jury testimony, not a single other employee of defendant's flower shop or any other business located on Beekman Avenue had been interviewed or approached by the FBI. It should be further noted that subsequent to defendant's indictment, other employees of the flower shop were, in fact, subpoenaed and their testimony was consistent with that of the defendant and inconsistent with that of Lois Hennessey.[2]

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[2] Jane Vitagliano began working at the flower shop on February 3, 1975 (A77), which was long after the December period inquired upon by the Grand Jury. She testified over two months after Cecco-

(Footnote continued on following page)

As part of defendant's preparation for trial various motions were made and presented to the Court. The Court held a conference and made its rulings in July of 1975. It took the Government in excess of two months to finally comply with the directives of the Court regarding defendant's motion practice. The Government's compliance finally occurred on the eve of trial. The list of witnesses presented to counsel contained the name of Patrolman Biro who was immediately interviewed by the defense. It was at this point in time that the defendant learned for the first time of the existence of a search (TR17-18).

The Government had contributed in no small measure to the defendant's surprise. Completely aside from failing to advise the defendant of a search of his premises when he was not present, and in the absence of a warrant for any conceivable probable cause, the Government took it upon itself to include in its discovery exhibits a certain envelope marked "12/31/74" which appeared to be, but was in fact not, the December envelope referred to in the

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(Footnote continued from preceding page)

lini's testimony and after his indictment as did each other flower shop witness. Her testimony was that Millow came in just to say "hello" (A77-78). She had never seen any gambling of any kind at the shop (A78). Cathleen Kosilla, a part-time employee (A78-81) was summoned to the Grand *Jury* after Ceccolini had been indicted (TR428). She had seen no gambling at the store (A81-82). Roseanna Pesce, who did work in the store in September and October of 1974 (A82-83) when Lois Hennessey did not work there (A82-83), was the wife of a New York City Police Sergeant (A82), had never been interviewed by the FBI and saw absolutely no gambling (A83). Lois Hennessey was there only for a matter of minutes after 5:00 during these months (A82-83). Defendant's girlfriend, Rosemary Albanese, brought to the Grand Jury in October *after* defendant's indictment (A48-49) saw absolutely no evidence of gambling at the flower shop (A50-51).

Grand Jury testimony. Aside from its misleading appearance, it had absolutely no other significance on the outcome of the case.

Upon discovery of the existence of a search, which defendant did not become aware of until the eve of trial, an immediate motion was made orally by defendant's attorneys before Judge Gagliardi, who observed that the defendant could not have moved sooner because he had no knowledge of the search (TR17-18). Judge Gagliardi directed that the hearing on the motion proceed simultaneously with the trial. The defendant waived his right to trial by jury and the trial commenced.

During the course of the trial, all the testimony that related to the search and its fruits came from Government witnesses during the direct case. The testimony with respect to this search and its fruits was given by Patrolman Biro and FBI Agent Emory, Detectives Spota and DeFalco and Ms. Hennessey. As the transcript of the opinion of the Court below demonstrates, Judge Gagliardi determined during the trial that the search was illegal and suppressed the result of the search. The relative portion of this commentary was contained in petitioner's Appendix D, Page 34a of the Appendix before this Court on petitioner's application for writ of certiorari. On Page 36a of that same document the Court however stated:

> "I don't think it makes any difference as to when I passed upon the exclusion of the fruits of the search because it was clearly inadmissable."

His Honor also stated that without the fruit of the illegal search:

> "There was insufficient evidence to say beyond a reasonable doubt that Ceccolini was guilty of Count 1 charged in the indictment." (Petitioner's *Petition* Appendix 32a).

The Court added that the remaining evidence:

> "standing by itself it is insufficient to prove Ceccolini guilty beyond a reasonable doubt." *Id.*

Notwithstanding that the motion to suppress was made immediately prior to the trial, and then only because the Government had withheld the existence of the search from the Court and the defendant, the Court, which heard both the motion and trial jointly, purported to decide the merits first and the ruling on the motion to suppress only thereafter in connection with the motion for judgment of acquittal. *The combined procedure of the Government and the Court resulted in depriving the defendant of a pre-trial or during the trial suppression ruling* (beyond the judge's post-verdict statement that he excluded the result of the search and that it made no difference when he passed upon the exclusion of the fruits of the search which were clearly not admissible). In the normal course of events (had the judge suppressed prior to or during trial or prior to announcing his verdict), since the remaining evidence was clearly insufficient and so found by the Court, the defendant would have been entitled as a matter of right to an acquittal. *Instead, the Court endeavored, by the order of its rulings, to create a right of appeal in the Government.* It is respectfully submitted that the procedure utilized was, in fact, a judgment of acquittal or the functional equivalent thereof and that any attempted appeal therefrom violates the double jeopardy clause, or in any event should not be permitted because of the inequitable conduct of the government.

The illegal search itself was described by both parties present (A25, 35-36, 51-52, 55-56). It was further added by Patrolman Biro that he had no prior knowledge of Ms. Hennessey as a possible witness and that he further specifically learned this during the illegal search conducted by him on December 18, 1974 (A58-59). He further testified that he notified the North Tarrytown detectives within

twenty-four hours. The testimony of the detectives indicated that they notified FBI Agent Emory. Agent Emory corroborated these statements by testifying that the North Tarrytown Police had notified him. Ms. Hennessey stated that Agent Emory told her he received his information regarding her and the December incident from the North Tarrytown Police and that he specifically asked her about the December incident (41-42). *She described it to him because she knew he already had or could get that information from the North Tarrytown Police* (A42-43). On the other hand, Ms. Hennessey testified that although it was football season and football tickets were hidden in wax paper at the store, she did not show these to Patrolman Biro (A43-44).

It was clear from all the testimony summarized above that the search was:

(a) Without probable cause,

(b) Without a warrant,

(c) Without consent,

(d) Not incidental to a lawful arrest, and

(e) Conducted by a law enforcement officer on duty and in uniform, without justification and unlawfully.

It was equally clear to the Court that Ms. Hennessey and her knowledge were the instant and immediate fruits of that search and the interrogation which took place was a part of that search (A36, 58, 39, 41-43). The district court specifically found the search illegal and suppressed both the results of the search (Petitioner's Petition Appendix 35A) and the fruits of the search (Petitioner's Petition Appendix 36A). It then set aside the verdict on the first count as the remaining evidence which was clearly insufficient to convict, exonerated bail and pursuant to the power vested in the Court by F.R.Cr.P. 29 entered judgment of acquittal in favor of defendant.

ARGUMENT

POINT I

The Government appeal of the instant case is precluded by the double jeopardy clause.

When the instant case appeared before the District Court below, Judge Gagliardi directed that defendant's motion to suppress and the trial be determined together as permitted by Federal Rule 12E where good cause is shown. During the course of trial, Judge Gagliardi made a specific finding that the search which transpired on December 18, 1974 was illegal and thereafter excluded what were the results of the search holding that the fruits of the search were clearly not admissible by reason of the exclusionary rule. It was the further finding of the Court below that the Government's attention had not focused on Lois Hennessey prior to the illegal search (Petitioner's Petition Appendix 28A-29A) and that the Government had not sustained its burden of showing that Ms. Hennessey's testimony would have been obtained definitely without the illegal search (Petitioner's Petition Appendix 29A). The Court below concluded that without Hennessey's testimony there was insufficient evidence to find defendant guilty on Count 1 and that the corroborating evidence standing by itself was insufficient to prove defendant's guilt beyond a reasonable doubt (Petitioner's Petition Appendix 32A).

Although a Court determination of acquittal was both merited and warranted by the finding below, Judge Gagliardi failed to follow this procedure. In a somewhat unique procedure, the Court purported to consider all the evidence before it including that evidence which it suppressed despite the fact that such evidence was inadmissible at trial. A determination was thereafter made by the Court which was based upon consideration given to *all* of the evidence, both legal and illegal. This determina-

tion stated that defendant Ceccolini was guilty on Count 1 of the indictment. However, Judge Gagliardi took this determination one step further and proceeded to immediately set aside his own verdict on the grounds that it could not stand without the illegal suppressed evidence and thereafter exonerated bail.

The events which transpired in the proceedings below can be best brought into focus by the recent decision of this Court in *United States* v. *Martin Linen Supply Co.*, 97 S. Ct. 1349 (1977). The defendant in the proceedings below was totally unaware that a search of his premises had occurred in his absence. This unawareness was due primarily to the Government's decision not to utilize the provisions of Federal Criminal Rule 12(D)(1) which provides notice to a defendant that the Government intends to introduce evidence obtained by search and seizure. Further difficulty arose when the Government egregiously delayed complying with Judge Gagliardi's pre-trial Order for several months so that defendant's counsel could not have learned of Patrolman Biro or that there had been a search until the eve of trial. This situation was expressly recognized by the Court below when it stated that the defendant was unable to move for suppression any earlier than he did as a result of the conduct of the Government (TR17-18). The Government's original position with respect to this fact was clearly set out in their Trial Memorandum of Law at Page 11 where they stated:

> "Until the trial, the Government was not concerned about the 'taint problem' because it believed Biro's search to be lawful."

Interestingly enough at trial, the Government utterly abandoned any argument that the search was consented to, or lawful, when the testimony of its own witnesses clearly established otherwise.

It should be apparent to this Court that the acquittal involved in the instant case was:

> "a legal determination on the basis of facts adduced at trial relating to the general issue of the case." (See *Serfass* v. *U.S.*, 420 U.S. 377, 393, 95 S.Ct. 1055, 40 L. Ed. 2d 265 (1975))

The decision of Judge Gagliardi was not an order dismissing an indictment, but rather an acquittal based upon the insufficiency of admissible evidence before the Court (See Opinion of Mr. Justice Stevens, concurring *U.S.* v. *Martin Linen Supply Co.*, supra at 1357). It should be noted that the acquittal was based upon the Judge's determination that the residuum of legal evidence introduced at trial

> "was insufficient evidence to say beyond a reasonable doubt that Ceccolini was guilty . . ."

and

> "standing by itself, it is insufficient to prove Ceccolini's guilt beyond a reasonable doubt." (Petitioner's Petition Appendix 32A)

The Tenth Circuit in reviewing a situation closely akin to Judge Gagliardi's procedural determination below found that jeopardy had attached and that 18 U.S.C. §3731 did not allow the Government the right to appeal. See *U.S.* v. *Fay*, 553 F. 2d 1247 (2nd Cir. 1977).

A review of the legislative history of 18 U.S.C. §3731 clearly demonstrates the fact that it was not the intention of Congress to authorize the right of the Government to take an appeal from an acquittal. The legislative report begins by stating that the purpose of the bill is

> "to resolve serious problems which frequently have arisen with respect to the right of the United States to appeal the rulings which terminate prosecutions other than by judgment of acquittal . . ." [S.Rep. No. 91-1296, Page 2 (1970)]

The report further defines what a true acquittal is in the eyes of Congress at Page 11. It is there stated

> "A true acquittal is based upon the insufficiency of the evidence to prove an element of the offense."

The *Gagliardi* decision with respect to Count 1 truly fits the definition of acquittal as referred to in the Congressional report. To take an appeal from this decision would be in direct contradiction to the legislative intent and is simply and unequivocally not allowed by the statute. The case which is presently before this Court is not simply a case where the post-verdict ruling is to dismiss an indictment after a guilty verdict where no new trial would necessarily result if the Government prevailed. See e.g., *U.S.* v. *Wilson,* 420 U.S. 332 (1975); *U.S.* v. *Morrison,* 50 L. Ed. 2d 1 (1976); *U.S.* v. *Rose,* 50 L. Ed. 2d 5 (1976); *U.S.* v. *Copp,* 50 L. Ed. 2d 336 (1976). In *Morrison* and in *Rose* there was neither an acquittal nor an order of dismissal. There was merely an order of suppression, which provided that appropriate action would be taken if the order was affirmed on appeal or not appealed from by the Government. In *Copp* the Court entered a dismissal (not an acquittal) based upon an error of law relating to the matter determined at a pre-trial motion and not during the trial of the general issue. In *Wilson* the District Court dismissed the indictment, again reversing a ruling on a motion made prior to the trial and not upon the matter in issue and litigated during the trial of the general issue as was the case here. Compare *U.S.* v. *Lucido,* 517 F. 2d 1 (6th Cir., 1975) in which case the Sixth Circuit ruling on an analogous fact pattern to the case before this Court held that the double jeopardy clause precluded review.

In recent years, some leading cases have emerged from the Supreme Court with respect to this area. The two perhaps leading cases are those of *U.S.* v. *Jenkins,* 420

U.S. 358 (1975) and *U.S.* v. *Wilson,* 420 U.S. 332 (1975). It is defendant's position that although the factual pattern of the instant case may superficially appear similar to that in *Wilson* due to the unique fact pattern of this case it falls more appropriately within the *Jenkins* rule as opposed to the rule set out in *Wilson.* Were this Court to entertain jurisdiction in this case, in the event of a reversal, before the verdict of guilty could be reinstated, new, different and additional findings of fact would be required with regard to the illegality of the search, the attenuation of the taint, and admissibility of the tainted testimony. The case would then come within the rule of *U.S.* v. *Fayer,* 523 F. 2d 661 (2d Cir., 1975). See also *U.S.* v. *Jaramillo,* 510 F. 2d, 808 (8th Cir., 1975); *U.S.* v. *Robbins,* 510 F. 2d 301, (6th Cir., 1975); *U.S.* v. *Sorenson,* 504 F. 2d, 406 (7th Cir., 1974). The Government, in the instant case, is not seeking an appeal solely on a question of law, but rather from the resolution of fact issues at trial which resulted in the defendant's discharge. However denominated, the defendant was in reality acquitted by the trial court's resolution of disputed fact issues in his favor. The double jeopardy clause makes the ruling final. To subject the defendant to any further proceedings at this time would violate the double jeopardy clause:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal of compelling him to live a continuing state of anxiety and insecurity . . ." (*Green* v. *U.S.,* 355 U.S. 184, 187, 78 S.Ct. 221, 2 L. Ed. 2d 199 [1957])

As a result of the Government's failure to disclose the existence of the search and the District Court's insistence

that contrary to the preferable method of proceeding in the Second Circuit there will be a joint hearing of the motion of suppression and the merits, no pre-trial hearing took place on the issue of suppression. Moreover, there was no good cause shown for deferring the ruling on the motion to suppress until after the verdict (which is required by Rule 12[e]) as distinguished from cause for hearing the general issue and the motion together. The basic understanding of the defense counsel on the court directed a joint hearing on the motion and trial was that the ruling on the suppression motion would precede the verdict on each count, and the findings on each count would be based on that evidence which survived the motion to suppress (Petitioner's Petition Appendix 33A). At no point below was defense counsel's original understanding ever disputed by the Court or the Government. It should be quite apparent that this understanding played a significant factor in defense counsel's reaction to the Court's decision to hold a joint hearing and defendant's decision to waive trial by jury. It cannot be disputed that the Government's action deprived the defendant of an opportunity to raise the question of suppression at any point prior to trial. Indeed, the findings of fact which the District Court made to support its judgment of acquittal were precisely those which result from a trial of the general issue that "There was sufficient evidence to say beyond a reasonable doubt that Ceccolini was guilty" and that the admissible evidence "Is sufficient to prove Ceccolini's guilt beyond a reasonable doubt". (Petitioner's Petition Appendix 32A). Upon the unique set of facts demonstrated by this case, the District Court's ruling however denominated, was a judgment of acquittal based upon factual issues elicited at the trial of the general issue and the Government's attempted appeal therefrom is clearly offensive to the provisions of the double jeopardy clause.

POINT II

The exclusion of the fruits of the concededly illegal search was proper.

The various factors involved with the aspect of the fruits of the illegal search have been painstakingly examined in meticulous detail by both the District Court below and the Circuit Court of Appeals. The Trial Court's findings that the December search was illegal, that witness Hennessey was discovered directly as a result of and in the course of that search and that the information was immediately conveyed to the local police and later to the FBI can hardly be disputed. The search was conducted by a police officer, in uniform, who was no stranger to the gambling investigation which related to the flower shop in that he had previously participated in the investigation. Without so much as one request for permission the police officer deliberately placed himself, without consent, in an area of the flower shop that was designated for employees only, and in which area he had no right to be in without permission of either an employee or the management of the flower shop. In a deliberate action the police officer seized and opened an envelope lying on the cash register which could in no way be construed as suspicious by reason of the fact that money appeared to be in the envelope, or protruding therefrom, since the cash register is not at all an unusual place to place money, either in or on.

After having seized and searched the envelope and its contents without warrant, probable cause, or consent, the Patrolman then immediately interrogated Lois Hennessey, who was working in the store at that very moment. At no time during this entire occurrence was defendant Ceccolini ever present. We can see by the actions of the police officer that immediately after the search, he exploited the illegality without the lapse of even a moment. The testi-

mony below indicates after the police officer had gotten what he wanted from Miss Hennessey, he replaced the contents into the envelope, placed it back on the cash register. Within 24 hours after his interview with Hennessey, the information which was obtained by the Patrolman as a result of his illegal search was conveyed to the Detective of his Department. The Detective Division notified FBI Agent Emory, and Agent Emory in turn relayed the information to the prosecutor.

The Government would have us believe that FBI Agent Emory was unaware of the illegality which tainted the origin of the information which he received. It is somewhat disingenious to suggest that the Government had no knowledge of the illegality of the search, since the "Silver Platter" doctrine renders knowledge of the local police who reported the information to the FBI, chargeable to the FBI. It is somewhat incredulous to say that the Government had no knowledge of the illegality since Lois Hennessey's description of the Search (A25, 26) made clear the illegal manner in which it occurred. Patrolman Biro was equally candid about this fact (A51-52, 55-56) the Government attempts to argue that the Hennessey testimony was somehow free of the taint of the manner in which she was discovered. However, it is clear that she was discovered solely and directly as the result of the search (A58-59). It is also clear that that fact, and that fact alone, relayed from the police to the FBI and the prosecutor, led the FBI to their interview with Miss Hennessey (A58-59, 67-68, 75-76). It should be apparent that she answered Patrolman Biro originally after he confronted and interrogated her with the illegally received evidence in his hands at a time and place where he was in uniform, and she felt constrained by the circumstances to answer his questions, but not to volunteer information (A43-44). Miss Hennessey further testified that she answered Agent Emory's questions because *she knew that he had or could get the information which he inquired about*

from the North Tarrytown Police (A42-43). This can hardly be construed as an act of free will divorced from the illegal search. Rather, it is so closely aligned with the search that it might properly be called the result, or more commonly the fruits of the illegal search.

The Court of Appeals specifically characterized this path as "both straight and uninterrupted". Judge Gagliardi, in the District Court below, specifically found that Lois Hennessey's knowledge first came to the attention of the Government as a result of the illegal search (Petitioner's Petition Appendix 28A, 29A). The FBI agent testified that Hennessey came to his attention because of the illegal search (Petitioner's Petition Appendix 30A). It was the further finding of the Court below that prior to the search the Government's attention had never focused on Miss Hennessey. Moreover, at the time she was interviewed, Hennessey no longer was an employee of the store, and therefore had no current information to provide. It is apparent that the findings of the District Court, affirmed on appeal, that the Government had failed to attenuate the taint of the illegal search, was not clearly erroneous. Indeed, the Government conceded as much on oral argument in the Second Circuit.

What the Government seeks to do here is to totally destroy the last vestige of the exclusionary rule by allowing illegally obtained evidence to come in as part of the prosecutor's direct case. Indeed, it comes in as the prosecution's entire case, because without it the evidence against this defendant is concededly insufficient. It should further be noted that it is false and misleading to suggest that an ongoing Federal gambling investigation involving contacts with various flower shop employees, was occurring at any time prior to defendant's Grand Jury testimony. As the testimony of Agent Emory indicated, his surveillance in the area had terminated at least one year before the occurrence of the illegal search. In six months the FBI had made no con-

tact with any employees of any enterprise for fear of tipping off those under observation (A73-74). In December of 1974, and in February of 1975, no employees of any enterprise had been contacted. In February of 1975, Miss Hennessey terminated her employment at the flower shop (TR60) and was not in an employee status when contacted by the FBI (A37-38). No other employees or ex-employees were ever contacted by the FBI until *after* the defendant had been indicted. Even then, no other employee of any other business enterprise in the area was ever contacted. The FBI policy at this time was to avoid contacting people such as Miss Hennessey for fear of compromising their investigation. It should be apparent that when Agent Emory attempted to suggest that at some date in the future he might ultimately have made contact with an employee, he was clearly talking about an employee still within the store to inform the FBI of current developments, rather than an employee who was no longer employed in the store, and was totally unaware of the recent developments which had taken place (A73-74).

Miss Hennessey clearly did not fit the pattern employed by the FBI in their investigation. In fact, none of the people who fit this pattern were contacted by the authorities until after the defendant had been indicted. Even after they were contacted, they supplied the Government with absolutely no helpful information. In fact, the evidence they supplied contradicted that which was given by Miss Hennessey. From this factual pattern Judge Gagliardi found that the conclusion that Miss Hennessey's testimony was a direct result of the illegal search was compelled by the record.

The Government's position that the exclusionary rule should not be applied to suppress evidence in prosecutions for crimes committed after an illegal search is incorrect, despite the fact that its draftsmanship was both artful and skillful. The defendant in the instant case never knew

of the illegal search until the eve of trial. It is inconceivable to infer that he would have had the intent to exploit its occurrence when he was not aware of it. He had no independent intent to commit any crime. The defendant appeared before a Federal Grand Jury by reason of a subpoena which was issued from a Federal prosecutor who knew full well of the prior search. *If anyone is guilty of exploitation it should be clear that it was the prosecutor who exploited the illegal search, not only in the secrecy of the Grand Jury, but under the most egregious circumstances.* The prosecutor substantially disarmed defendant by advising him that he was not a target of the investigation, and this was the only advice which the defendant received from the prosecutor. By contrast, other witnesses in this same investigation were warned specifically of their right to counsel, and of the privilege against self-incrimination, and were not given any disarming advice that they were not targets of the investigation, even when, in fact, they were such targets. This sequence of events, which resulted in the defendant's immediate indictment does not eliminate the suggestion of sophisticated, calculated abuse of the Grand Jury. *See U.S.* v. *Mangujano,* 425 US 564, 96 S.Ct. 1768, 48 L.Ed.2d 212 (1976), Brennan, J. and Stewart J. concurring.

It is particularly noteworthy that in two cases cited for the prosecution, that such evidence should be admitted, in the Fifth and Ninth Circuit Courts of Appeal took pains to point out that the situation might be very different if the defendant did not know prior to the Grand Jury of the illegal search. *U.S.* v. *Turk,* 526 F.2d 654, 667, n.39 (5th Cir. 1976); *U.S.* v. *Raftery,* 534 F.2d 854, 857, n.7 (9th Cir. 1976). As the Fifth Circuit observed, there would be a deterrent value in prohibiting the surprise use of illegally seized evidence to obtain a perjury conviction. This distinction is also alluded to in *U.S.* v. *Paepke,* 550 F.2d 385 (7th Cir. 1977). *The Government's conduct rose*

to the level of entrapment offensive to the fundamental concepts of fair play embodied in due process clause. The defendant had no pre-disposition to go to the Grand Jury. He appeared before the Grand Jury under compulsion of Federal subpoena and uncounselled. It was not his choice as to the subject matter of his interrogation or its time or place. He was given no warning of his right to counsel, although that warning is normally given by United States Attorneys in the Second Circuit. Nor was the defendant given any warning regarding his privilege against self-incrimination, although that warning is usually given by United States Attorneys in the Second Circuit. Still unaware of the illegal search, he was advised and, indeed, substantially disarmed by the prosecutor, who told him that he was not a target of the investigation. This was the only advice he received from the prosecutor. This was the basis upon which the prosecutor chose not to fairly apprise him of his situation, but rather, to steer the defendant toward the shoals of a perjury indictment as he sat blindfolded, disarmed, uncounselled and unwarned in the Grand Jury.

The fact pattern before this Court is a far cry from those underlying the *Turk* and *Raftery* decisions. In each of those cases the defendants sought to take advantage of his knowledge that the search was illegal. A fair balance struck between the competing interests cannot allow the Government to play its cards as close to the vest as it did here and then allow the Government to turn around and request of this Court the right to violate the defendant's rights just one more time. This is doubly so with the evidence as introduced as part of the Government's direct case, and is the only evidence upon which a conviction may be based. The procedure employed by the Government in this case dates back to the inquisitorial days of Spain. No case has gone so far as to sanction such a result and it is insisted that none should.

> "Courts which sit under the Constitution cannot and will not be a party to lawless invasion of the constitutional rights of citizens by permitting unhindered Governmental use of the fruits of such invasions." [*Terry* v. *Ohio,* 392 U.S. 1, 12-13, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)].

The deterrent value of the exclusionary rule is most likely to be effective at cases where official conduct is flagrantly abusive of the Fourth Amendment rights. The corresponding mandate to preserve judicial integrity most clearly demands that the fruits of official misconduct be denied in this case. See *Brown* v. *Illinois,* 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).

There is no evidence present in the instant case which could insinuate that Patrolman Biro had any reason to believe that his search was legal. His testimony clearly excludes that possibility. To allow into the Government's direct case the results of so flagrant and deliberate an intrusion is to discard the Fourth Amendment totally. By reason of the fact that Biro returned the physical evidence to its original location after interrogating Ms. Hennessey and its subsequent disappearance, there was no physical evidence to suppress. Unless the testimony of Biro and Hennessey were suppressed, the Government would suffer naught for the flagrant violation of the defendant's rights.

The Government's next attempt to escape the logic that Ms. Hennesey's testimony was excluded by reason of the exclusionary rule. The Government argues that the purpose of the exclusionary rule is not served by forbidding the use of the legally obtained evidence to prove the entirely separate offense of the defendant's perjury before the Grand Jury. It is the Government's position that the purpose of the exclusionary rule is satisfied since the Government is precluded from using this testimony in a

prosecution of the defendant for gambling offenses, and thus the deterrent intent of the rule is preserved. Such an argument, however, conveniently avoids the more fundamental guarantees of the Fourth Amendment which are secured and protected by the exclusionary rule and specifically set out in the Fourth Amendment:

> "The purpose of the exclusionary rule is not only to discourage overreaching by the police, but also, and primarily to protect the rights and privacy of the citizen." (U.S.C.A. Const. Amend. 4)

The rationale set forth in the Fourth Amendment has been followed by this Court on several instances. In the case of *McNabb* v. *U.S.*, 318 U.S. 332, 339 (1942) the Court stated

> "A conviction in Federal courts, the foundation of which is evidence obtained in this regard and violation of liberties deemed fundamental by the Constitution cannot stand."

Also see *Weeks* v. *United States*, 232 U.S. 383, 34 S.Ct. 341, 586 L.Ed. 652 (1914); *U.S.* v. *Isaacs*, 347 F. Supp. 743 (N.D.E.D. Ill. 1972); *U.S.* v. *Winsett*, 518 F. Supp. 51, (9th Cir. 1975); and *U.S.* v. *Edwards*, 441 F. 2d 749 (5th Cir., 1971).

In addressing the Court to the issue of whether or not the exclusionary rule should apply to subsequent trials of perjury, it is submitted that any attempt to distinguish between perjury trials and trials of substantive crimes be eliminated. Support for this rule has been advocated in the opinion of Mr. Justice Brennan in his dissenting opinion in *U.S.* v. *Calandra*, 414 U.S. 338, 355, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). The crucial portion of the dissenting opinion stated

> "The protection provided for under the Fourth Amendment is equally extended to the actions of

> the Government and officers of the law acting under it. To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance of the prohibitions of the Constitution, instead for the protection of the people against such unauthorized action." *Id*, 355-356.

Thus, we submit that the Government's position describing the exclusionary rule as merely a judicially creative remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect is in error. The more appropriate description of the exclusionary rule is that it is

> "part and parcel of the Fourth Amendment's limitation upon governmental incroachment of individual privacy and gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that which honest law enforcement is entitled and to the courts, that judicial integrity so necessary in the true administration of justice." *Mapp* v. *Ohio*, 367 U.S. 343, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)

To distinguish the application of the Fourth Amendment as applicable to one type of procedure and not another, as the Government advances, is to "keep the words of promise to our ear and break it in our hope". *People* v. *Martin*, 382 Ill. 192, 196 (1942).

> "The Constitutional guarantee against unreasonable search and seizure protects all: both the innocent and the guilty." *U.S.* v. *Monroe*, 205 F. Supp. 175 (E.D. Louisiana, 1962).

Therefore, to permit the illegal action of Patrolman Biro in the instant case to redound to the Government's advantage impairs the Constitutional safeguard under consideration, and demands suppression. It is pertinent to recall

the historic admonition of Mr. Justice Brandeis, dissenting in *Olmstead* v. *U.S.*, 277 U.S. 438, 485, 48 S.Ct. 564, 72 L.Ed. 944 (1928):

> "If the Government becomes a lawbreaker, it breeds contempt for law, and it invites every man to become a law unto himself. It invites anarchy. To declare that in the administration of criminal law, the ends justify the means—to declare that the Government may commit crimes in order to secure a conviction of a private criminal, would bring terrible retribution."

See also *U.S.* v. *Edmons*, 432 F. 2d 577 (2d Cir., 1970).

Thus, it is apparent that the downgrading of the exclusionary rule to a determination of whether its application in a particular type of proceeding further deterrents of future police misconduct therefore reflects a startling misconception of both historical objective and the basic purpose of the rule.

POINT III

The trial court below properly suppressed the testimony of Lois Hennessey.

In an attempt to escape the logic of the effect of the exclusionary rule with respect to Ms. Hennessey's testimony, the Government takes the contention that the witness' testimony should not be excluded due to the fact that she is a "live witness". It is submitted that such a distinction is illogical and defeats the fundamental principles of the Fourth Amendment and the exclusionary rule. Interestingly enough, while the Government argues the theory of live witness with respect to Ms. Hennessey, they do not suggest that the testimony of Patrolman Biro should thereby be admissible although he is equally alive.

The reason they avoid this issue is due to the fact that a suggestion of this type could only serve to make a shambles of any pretense of deterrence in that it would allow the physical evidence to be suppressed but the illegal searcher to describe it with exactly the same force and effect. Thus, it is submitted why should the rule be different if a second police officer is present to allow him to testify because he is a live witness? Further, should the rule be different as to Ms. Hennessey who is a live witness to whom Biro revealed his ongoing illegal search, and thereby exploited it directly?

As the case law in this area reveals, the exclusionary rule has instructed us to decide these matters on a case by case basis taking into account a myriad number of factors. This procedure was employed by this Court over a decade ago in the case of *Wong Sun* v. *U.S.*, 371 US 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) where it was stated at Page 485 of that decision:

> "Verbal evidence which derive so immediately from an unlawful entry and an unauthorized arrest . . . is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion."

It was further stated at Page 486 of that decision:

> "Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence. Either in terms of deterring lawless conduct by federal officers, or *Rea* v. *U.S.*, 350 U.S. 214, 76 S. Ct. 292, 100 L. Ed. 233 (1956), or of closing the doors of the federal courts to any use of evidence unconstitutionally obtained, *Elkins* v. *U.S.*, 364 U.S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960), the danger in relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction."

To allow the Government's differentiation would remove all restraint upon the unlawful police conduct by enabling them to use the derivative fruits of their legal search as long as they could find a "living witness" discovered indirectly by the search. It should also be apparent that this situation would also provide for the indiscriminate violation of an individuals' right to privacy. If logic is to prevail, the same rule of exclusion should follow from an illegal search whether the evidence be animate or inanimate, tangible or intangible, living or dead. Any conclusion to the contrary would be totally inconsistent with the basic Fourth Amendment liberties.

The Fifth Circuit dealt with the aspect of live testimony in the case of *U.S.* v. *Marder,* 474 F. 2d 1192 (1973). The Court stated on Page 1196:

> "Any other conclusion would be totally inconsistent with the fundamental purpose of the exclusionary rule; to instill respect in Government officers for a citizen's Fourth Amendment rights."

Numerous other federal cases have dealt with this same aspect. In the case of *Walder* v. *U.S.,* 347 U.S. 62, 64, 74 S.Ct. 354, 98 L. Ed. 2d 503 (1954), the Court stated:

> "It is settled law that the Government may not use the fruits of the unlawful conduct of its agent, that is, either physical or intangible evidence secured thereby, nor can it use evidence obtained through leads from the unlawfully obtained evidence. The evidence directly obtained and that obtained through such leads is tainted by the unlawful conduct." See also *Wong Sun* v. *U.S.,* supra at 484, 486, (1962); *Nardone* v. *U.S.,* 308 U.S. 338, 341, 343, 60 S.Ct. 266, 84 L. Ed. 307 (1939); *S. Etheridge* v. *U.S.,* 380 F. 2d 804, 808, (5th Cir., 1967); *U.S.* v. *Basurto,* 497 F. 2d 781, 783 (9th Cir., 1964); *Gissendanner* v. *Wainright,* 482 F. 2d 1293, 1295 (5th Cir., 1973).

In *U.S.* v. *Brignoni-Ponce,* 422 U.S. 873, 876, 95 S.Ct. 2574, 45 L. Ed. 2d 607 N.2 (1975) the Supreme Court expressly did not address itself to the suppression of voluntary testimony. The case there cited, *U.S.* v. *Guana-Sanchez,* 484 F. 2d 590 (7th Cir., 1973) expressly held that such testimony should, in fact, be suppressed. This is the rule in this Circuit. See *U.S.* v. *Tane,* 329 F. 2d 848 (2d Cir., 1964). The Fifth Circuit in the case of *Williams* v. *United States,* 382 F. 2d 48 (5th Cir., 1967) cited with approval this Circuit's decision in the *Tane* case.

In support of its position, the Government cites several cases involving express consent, abandoned property, a warrant with sufficient untainted probable cause and other cases which are totally inappropriate. *In the instant case* as in *U.S.* v. *Karanthanos,* 531 F. 2d 26 (2d Cir., 1976), Cert. Den. 428 US 910, *the official misconduct was both flagrant and deliberate, and the closeness between the original illegality and the witness' testimony is as clear in this case as it is possible to be upon an issue where the information rests entirely within the province of the Government agents and Government witnesses.*

In the instant case the patrolman knew he had no right to search, and therefore replaced the material seized so as to cover up the tracks he had no right to leave in the first place. He did, however, utilize the results of his search to interrogate and discover Government witness Hennessey, and thereby compounded his intrusion by exploiting his already illegal search. He looked into the envelope because of suspicion as to what it might contain despite the fact that there was nothing peculiar about the envelope. The actions of the patrolman were purposeful, deliberate and flagrant official misconduct. Certainly, he did not hesitate to exploit the results of his illegal search.

It is submitted by the defendant that the instant case presents the same exploitation of illegal testimony by the

Government. The Government would urge that the taint is purged by attenuation. The individual decision to speak should not alter the fact that his discovery has been obtained by the use of illegally obtained evidence, as in the case at Bar:

> "Once we focus on the relevant criteria, we will have gone a long way toward making analysis both tractable and serviceable to the deterrent ends of exclusionary rules by carefully defining what the inquiry should at most consist of; not useless inquiries as to the will or responsibility of the witness whose utterances are in question, but in inquiry directed solely at the responsibility of the prosecution and its agents for turning up that evidence—an inquiry that asks if the prosecution exploited the improper conduct of which it was guilty." (Ruffin, Out on a Limb of a Poisonous Tree: The Tainted Witness, 15 UCLA L.Rev. 32, 33 [1967])

A fair and careful review of the record below establishes that the District Judge was well within the realm of the trier of facts in concluding as he did that the search was illegal, that Miss Hennessey's testimony was the fruits of illegality, and that it was required to be suppressed. It is submitted that an application of facts in the case at Bar to the aforementioned holdings dictate the suppression of Hennessey's testimony as fruit of the poisonous tree. Any argument on the part of the Government with respect to an exception to the exclusionary rule on the basis of the fact that the evidence is that of a "live witness" should not be allowed. One of the ultimate questions to be asked by the Court is how the rights of the defendant have been affected by the actions of the Government.

> "If the rights of a citizen under the Constitutional safeguard against unreasonable searches and seizures are violated, any evidence so obtained for the use against the citizen in a criminal prosecution must be suppressed." *U.S.* v. *Macry,* 185 F.Supp. 144, 146 (D. Conn. 1960)

The distinction proposed by the Government with respect to tangible and intangible evidence has continually been rejected by the courts. In addition to authority already cited it should be noted that the Eighth Circuit has held:

> "Evidence tangible or intangible, directly or indirectly gained as a result of an illegal search is tainted fruit of the poisonous tree and is inadmissible." *Peterson* v. *U.S.,* 411 F. 2d 1074, 1078 (8th Cir. 1969)

No distinction remains, if ever one existed, between tangible evidence and "live witnesses" when determining what is, or is not, the fruit of the poisonous tree. Any other result is inconsistent with the deterrent rationale of the fruit of the poisonous tree doctrine.

POINT IV

The Government totally failed to establish that Lois Hennessey's testimony would have been discovered absent the illegal search.

The inevitable discovery exception has been found to serve well the theory of the exclusionary rule by denying the Government the use of evidence arrived at by exploitation of illegality and at the same time minimizing the opportunity for the defendant to receive an undeserved and socially undesirable bonanza. To establish the exception, the prosecution must

> "Satisfy the court, as a fact, that the proferred evidence would have been acquired through lawful sources of information even if the illegal act had never taken place. Since such act did in fact occur and further, did in fact produce the evidence, this is not a simple task." (Maguire, "How to Unpoison the Fruit, The Fourth Amendment and the Exclusionary Rule", 55 J. Krim. L.C.&P. S. 307, 317 [1964])

Miss Hennessey was specifically contacted at, and later in regard to, the December 18th incident. Her testimony relative to the defendant was the direct fruit of these inquiries. The evidence produced was far from the normal output of the investigation as it had been conducted up to, and after, the December incident. Indeed, it can be fairly said that the December search totally and radically altered the procedure used in this investigation, with regard to the defendant herein, so that it differed radically from every single other surveillance of business premises conducted on the same street during the same investigation by the same FBI agent.

As this Court is well aware, the test in the Second Circuit and elsewhere has never been whether it is inconceivable that the Government might through some unspecified fortuitous circumstance have stumbled across Miss Hennessey at some time in the future. Rather, the test employed requires that where it is clearly established through the Government's own witnesses that the illegal search was the actual source of the Government's information, and that prior to this illegal search the Government's attention had not focused on her in that capacity, the Government must bear the burden of establishing that Miss Hennessey's testimony would have been both discovered and procured in the normal course of its investigation. See *U.S.* v. *Falley,* 489 F.2d 33 (2nd

Cir. 1973); *U.S.* v. *Paroutian,* 299 F.2d 486 (2nd Cir. 1962); *U.S.* v. *Schipani,* 414 F.2d 1262 (2nd Cir. 1969); and *U.S.* v. *Tane,* 329 F.2d 848 (2nd Cir. 1964). The record below is convincing with respect to the fact that there is no way of which the Government could have obtained the identity of Miss Hennessey if it were not for the illegal search of Patrolman Biro. The entire path and subsequent history of the investigation indicates that no attempts were ever made to interview employees for fear of tipping off those being surveilled. This was true in 1973 as in 1974. The Government never departed from this procedure during the entire investigation, with the exception of Miss Hennessey.

Lois Hennessey was interviewed for the first time a month after she had ceased to be a part-time employee. No other employee of the shop was then interviewed, or had any information of value to supply to the FBI. The only ex-employee, Mrs. Pesce, was ever interviewed by, or apparently known to the FBI. It simply never crossed Agent Emory's mind to go looking for any past employee until, as a direct result of the illegal search, he sought out Miss Hennessey to obtain the details of the incident surrounding the illegal search.

The only evidence offered by the Government to avoid the obvious failure to question employees in both the 1973 and 1974 invstigations was the subpoening of other flower shop employees *after* the defendant's indictment, and the vague intentions of Agent Emory regarding employees in the future. This falls far short of the showing required by the case cited in the Petitioner's Brief. In *U. S.* v. *Cole,* 463 F.2d 163, 172 (2nd Cir. 1972) a saturation investigation of the particular defendant based on independent information of VAST SUMS OF CASH CONCEALED from the Government was involved. In addition, that case involved a *sustaining* of findings of fact *in favor* of the Government.

Here the Court found against the Government and the record supports, if not compels, that result. In *U. S.* v. *Evans,* 454 F.2d 813, 818-19 (8th Cir. 1972) the Court approved exclusion where there was no independent source and

> "The illegality directly led to the identity of the otherwise unknown witness without intervening factors of the attenuating character." Id. at 818.

The Court further stated:

> "Those cases which do not exclude the live testimony generally involve situations where the illegality did not directly result in the learning of the name of the informant used as a witness at the trial, or where there were substantial attenuating circumstances or an independent source."

It should be obvious to this Court that the exact opposite factual pattern was disclosed by the record below in the instant case. Thus the cases cited are not supportive of the Government's position because factually they are all significantly different and distinguishable. It is insisted that there is a total failure on the part of the Government to meet the burden of establishing either that Lois Hennessey's testimony was not sufficient to trigger the *type* of investigation which led to her, or that she would have been the normal output of the investigation conducted prior to the illegal search. *U. S.* v. *Falley,* 489 F.2d 483 (2nd Cir. 1973); *U. S.* v. *Paroutian,* 299 F. 2d 486 (2nd Cir. 1962); *U. S.* v. *Schipani,* 414 F.2d 1262 (2nd Cir. 1969); and *U. S.* v. *Tane,* 329 F.2d 848 (2nd Cir. 1964).

A fair and careful review of this record establishes the District Judge was well within the realm of the trier of facts in concluding as he did that the Government failed to meet its burden on the issue of attenuation. His decision in this regard should in all respects be affirmed.

POINT V

The inequitable conduct of the Government estops it from appeal or from asserting a claim of attenuation of taint.

It need hardly be argued that the foundation of law is equity. The maxims "He who seeks equity must do equity." and "He who seeks equity must come into court with clean hands." have governed the granting or denial of relief in our civil courts. Just as our courts will not permit a wrongdoer to profit from his wrongdoing nor will our courts grant relief to a party who is guilty of inequitable conduct, the courtroom door has also been barred to illegally obtained evidence and sanctions applied to trespassing prosecutors.

These principles of law are not limited to cases where the inequitable conduct is such as to enable the moving party to personally complain. Indeed, there is no requirement to plead the claim of inequitable conduct per se at all. The Court should apply this doctrine not to favor a defendant, but to protect the interests of the public. Indeed, the Court should act sponte sua to apply these principles at any stage of any proceedings where the inequitable conduct is brought to the Courft's attention. 30 CJS Equity, §97, pp. 1031-1032; 20 NY Jur. Equity, §112, p. 132; *McMullen* v. *Hoffman,* 174 US 639, 19 S.Ct. 839, 43 L.Ed. 1117 (1899); *General Electric Company* v. *Hygrade Sylvania Corp.,* 45 F.Supp. 714 (SDNY 1942); *Bell & Howell Co.* v. *Bliss,* 262 F. 131 (7th Cir. 1919); *Memphis Keeley Institute* v. *Leslie E. Keeley Co.,* 155 F. 964 (6th Cir. 1907); *Gynex Corp.* v. *Dilex Institute of Hygiene,* 85 F.2d 103 (2nd Cir. 1936).

Our courts in dispensing criminal law should be no less required to fashion a just remedy, not only to prevent injury to the presumedly innocent defendant who stands

before it, but to prevent the encouragement of wrongdoing by the prosecution as a policy instrument of a free Government. Our courts should never be required to render an inequitable decree. Our courts should never be justified in doing anything other than equity. *McCann* v. *Charm Power Company,* 211 NY 301 (1914). In sum, wherever the wrong is directly related to, or committed in regard to the subject matter in litigation, equitable relief has been denied, and properly so, to a civil litigant in cases ranging from a description of a wrong as unjust [*Seagirt Realty Corp.* v. *Chaznoff,* 13 NY 2d 282 (1964)]; reprehensible unconscientious or inequitable to immoral or unconscionable [*National Distillers & Chemical Corp.* v. *Sayopp Corp.,* 17 NY 2d 12 (1966)].

A review of the procedural due process rights and the substantive due process rights afforded to the accused defendant in a criminal case reveals that each and every one of them are based upon the equitable principles enunciated above:

1. The right to counsel at all stages of the criminal prosecution commencing with the accusatorial process, where a defendant is in custody of the police. No court will permit evidence obtained from such a defendant to be introduced against him in a criminal proceeding where he has not been advised of his right to counsel, right to remain silent, and further advised that anything he says could be held against him, and that if he cannot afford counsel it will be provided by the court. *Miranda* v. *Arizona,* 384 US 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

2. The exclusion of evidence obtained as a result of an illegal search and seizure. *Mapp* v. *Ohio,* 367 US 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) reh. den. 368 US 871, 82 S.Ct. 23, 7 L.Ed.2d 72.

3. The exclusion of tainted identification through improper lineups or showups. *U.S.* v. *Wade,* 388 US 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1178 (1967); *Gilbert* v. *California,* 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967). *Stovall* v. *Denno,* 388 US 293, 87 S.Ct. 1907, 18 L. Ed. 2d 1199.

4. The requirement that the prosecutorial authorities supply the defendant with exculpatory evidence coupled with the sanction against the prosecutorial authorities for the suppression of same. *Brady* v. *State of Maryland,* 313 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963).

5. The requirement that an indigent defendant be provided with not only counsel, but transcripts and investigatory services at the Government's expense. *Griffin* v. *California,* 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 2d 891 (1956).

6. The requirement that the defendant be guaranteed a speedy trial *U.S.* v. *Ewell,* 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed. 2d 627 (1966).

7. The requirement that a defendant be afforded the protection of double jeopardy *Benton* v. *Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed. 2d 707 (1969).

The sword cuts both ways. In the landmark decision, *Harris* v. *New York,* 401 U.S. 722, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971). This Court determined that evidence illegally obtained by the Government, while not usable on the prosecution's case in chief against the defendant, may nevertheless be used for impeachment purposes in the event the defendant does take the stand on the theory that the courtroom door should not be open to perjury. In effect, the Court has stated that if the defendant seeks to avail himself of an opportunity to lie, his inequitable conduct in committing perjury will estop him from objecting to the introduction of otherwise illegally obtained

evidence against him for impeachment purposes or rebuttal. *Walder* v. *U.S.* 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 2d 503 (1954).

An analysis of the Government's conduct in this case, as set forth hereinabove in Points I through IV, amply demonstrates the unconscionable and inequitable conduct of the Government. By suppressing the fact of the illegal search and seizure until the eve of trial, the defendant was deprived of the opportunity to make a Rule 12 motion prior to the trial which would normally—except for good cause shown—which good cause was never demonstrated, have resulted in a pre-trial suppression of the illegally obtained evidence. Upon trial, such evidence would never have been admitted or considered by the trial judge, and the verdict would have been not guilty, upon which there would have been entered a judgment of acquittal.

By acting in the manner in which it did, the Government sought to take advantage of its own inequitable conduct in an attempt to create an appeal after trial, where otherwise none would exist. It could be argued that the Government would have had an opportunity to appeal a pre-trial determination that the evidence was obtained as a result of an illegal search and seizure by making the representation required by the Statute 18 USC §3731. However, that issue could then have been resolved at the proper time, and in the proper manner without prejudicing the defendant. Even if the Government would have been successful (which indeed they were not) in obtaining a judicial ruling permitting the introduction of what was otherwise ruled illegally obtained evidence, such an adverse pre-trial ruling would not have mandated the defendant's conviction. Trial strategy could have been altered. Different trial tactics could have been applied by trial counsel. Perhaps there would have been no waiver

of a trial by jury, and a jury could have acquitted. The disclosure of the otherwise suppressed Government witnesses at an earlier stage would have provided the defendant and his counsel an opportunity to explore the testimony and the circumstances. Other witnesses could possibly have been located to impeach or impair the credibility of Miss Hennessey and Patrolman Biro. All of this was denied to the defendant by the inequitable conduct of the Government.

It is thus obvious that by acting in the unconscionable manner in which it did, unwittingly aided by the trial court, the Government was able to obtain a verdict of guilty upon the use of the illegal evidence. When the trial court then overturned its guilty verdict by suppressing the otherwise considered illegal evidence, as authorized by Rule 12(e), the Government was thus placed in a superior position. If their position is corerct, that a right to appeal does exist through the trial court's decision, on the grounds that the decision was merely a dismissal rather than a judgment of acquittal, the Government can now argue that if the taint was attenuated, the guilty verdict must be reinstated. Cf. *U.S.* v. *Dinitz,* —— US ——, 96 S.Ct. 1075, 1081, 47 L. Ed. 2d 267 (1976).

If this Court permits such inequitable conduct on the part of the Government to be blessed with its approval, it would serve to encourage the Government to suppress revelation of its illegal searches and seizures until the last possible moment, rather than to reveal such information at the earliest possible moment. The Government would be encouraged to prevent pre-trial disposition of Rule 12 motions so as to encourage, without good cause shown, the judicial determination of Rule 12 motions at or after the trial in order to enable the Government to claim the right of appeal from an overturned guilty verdict, where otherwise there would have been no appeal

from a judgment of acquittal entered on an innocent verdict, even though based upon the suppression of illegally obtained evidence.

In view of the foregoing, this Court should deny the Government application for relief based upon its inequitable conduct. *The Government has not come before this Court with clean hands!*

CONCLUSION

By reason of the double jeopardy clause and the principle established under the theory of estoppel, the Governments appeal should be dismissed, or in the alternative the order of the District Court should be affirmed.

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October 21, 1977

Respectfully submitted,

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